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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 752

DAI MING SHIH, WONG LUM, AND FU KUEI HSU
Petitioners,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No.

DAI MING SHIH, WONG LUM, AND FU KUEI HSU
Petitioners,
v.
ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming a judgment of the District Court.

Opinions Below

The opinion of the Court of Appeals has not yet been reported and is set forth in the Appendix at pp. 17-19. The District Court filed no opinion. Its judgment is set forth at p. 21 of the Appendix.

Jurisdiction

The judgment of the Court of Appeals was entered on November 30, 1961. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether under the requirement of Section 243(a) of the Immigration and Nationality Act, 8 U.S.C. 1253(a), that an alien be deported to the country of which he is a "subject, national or citizen, if such country is willing to accept him into its territory", a native of China may be deported to Formosa as the country of which he is a subject, national, or citizen.

2. Whether the term "its territory" as written in this section includes *de facto* territory.

Statute Involved

Section 243(a) and (b) of the Immigration and Nationality Act, 66 Stat. 163, 212, 213, 8 U.S.C. 1253(a) and (b), provides:

> The deportation of an alien in the United States provided for in this chapter, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national or, had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its

territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be directed to any country of which such alien is a subject, national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—

(1) to the country from which such alien last entered the United States;

(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;

(3) to the country in which he was born;

(4) to the country in which the place of his birth is situated at the time he is ordered deported;

(5) to any country in which he resided prior to entering the country from which he entered the United States;

(6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or

(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory.

(b) Deportation during war.

If the United States is at war and the deportation, in accordance with the provisions of subsection (a) of this section, of any alien who is deportable under any law of the United States shall be found by the Attorney General to be impracticable, inadvisable, inconvenient, or impossible because of enemy occupation of the country from which such alien came or wherein is located the foreign port at which he embarked for the United States or because of reasons connected with the war, such alien may, in the discretion of the Attorney General, be deported as follows:

(1) if such alien is a citizen or subject of a country whose recognized government is in exile, to the country in which is located that government in exile if that country will permit him to enter its territory; or

(2) if such alien is a citizen or subject of a country whose recognized government is not in exile, then to a country or any political or territorial subdivision thereof which is proximate to the country of which the alien is a citizen or subject, or, with the consent of the country of which the alien is a citizen or subject, to any other country.

Statement

Petitioners are each natives of China who have been ordered deported (R. 2, 7, 9). They have been served with notices that their deportation has been directed to Formosa (R. 4).

Following notice of the intended deportation to Formosa, petitioners instituted an action in the District Court below to obtain a judgment declaring that their deportation to Formosa is in violation of Section 243(a) of the Immigration and Nationality Act, upon the ground that they are not subjects, nationals, or citizens of Formosa (R. 2, 3). The

District Court entered summary judgment for the Attorney General (R. 15, 16). On appeal to the United States Court of Appeals for the District of Columbia Circuit, the judgment was affirmed (R. 20).

Reasons for Granting the Writ

Section 243(a) of the Immigration and Nationality Act, *op. cit.*, requires the Attorney General, as a second priority, to direct the deportation of an alien to the "country of which such alien is a subject, national, or citizen if such country is willing to accept him into its territory".

The decision below poses two questions: (1) whether an alien who has been found administratively to be a native and citizen of "China" may be deported, under this clause, to Formosa as a subject, national or citizen of that country; and (2) whether Formosa may be regarded as the "territory" of "China", or of the Republic of China within the meaning of the statute.

The District of Columbia Circuit construed "China" to mean the "Republic of China" [Cf. *United States ex rel. Moon v. Shaughnessy*, 218 F. 2d 316, 318-319 (C.A. 2, 1954), and *Leong Lean Do v. Esperdy*, 197 F. Supp. 604, 607-608 (S.D. N.Y., 1961)][1] and assimilated nationality in that country to citizenship in Formosa.

I

Although courts have previously held that the term *country* in the immigration statute need not be limited to an international sovereignty, *Rogers v. Cheng Fu Shang*, 108 U.S. App. D.C. 115, 280 F. 2d 663, cert. denied, 364 U.S. 891 (1960); *Ying v. Kennedy*, U.S. App. D.C. ——, 292 F. 2d 740,

[1] See also for a contrary construction of the term "country of . . . nationality," in Section 6 of the Refugee Relief Act of 1953, 67 Stat. 405, 50 U.S.C.A. App. 1971(d), *Chin Yun Chu v. Brownell*, 101 U.S. App. D.C. 204, 247 F. 2d 790 (1957).

cert. denied, 368 U.S. 914 (1961); *United States ex rel. Moon* v. *Shaughnessy*, op. cit. (but see *United States ex rel. Mensevich* v. *Tod*, 264 U.S. 134, 137) (1923), the holding below introduces the novel concept that nationality and citizenship, for the purpose of a deportation statute, may be attributed to an entity other than a sovereign state. Cf. *United States* v. *Wong Kim Ark*, 169 U.S. 649, 667-668 (1897); *Protocol Between the United States and Other Powers Relating to Military Obligations in Certain Cases of Double Nationality*, 50 Stat. 1317, Treaty Series 913 (1932), 4 Treaties, etc. (Trenwith, 1038) 5261; *Convention Between the United States and Other American Republics on Rights and Duties of States*, 49 Stat. 3097, Treaty Series 881 (1934), 4 Treaties, etc. (Trenwith, 1938) 4807.

The language in question here has its origin in Section 23 of the Internal Security Act of 1950, 64 Stat. 987, 1010, 8 U.S.C. Supp. V, 156(a), and has not been previously examined by this Court.

Whether the Attorney General, in directing an alien's deportation to the country of which he is a subject, national, or citizen, may deport him to an entity, such as Formosa, which is plainly not a national sovereignty and in which the alien is not a subject, national, or citizen raises important questions of both domestic and international law.

A construction of the statute which permits the deportation of an alien to a geographic or political body to which he owes no fealty is in clear conflict with its express words. In effect, it reads out of the statute the requirement that the alien be a subject, national or citizen of the country specified in the second priority. Indeed, in the Court below, the Attorney General conceded that the requirement of the statute is not met here in the absence of a "finding or conclusion that the deportable alien was a 'subject, national, or citizen' of 'Formosa' as distinct from 'China' or the 'Republic of China'"; and that such a finding "is legally

impossible * * * since in the present international situation, Formosa is merely a geographical place, 'its (juridical) status being in limbo' . . . ; Formosa' in its present status'', the Attorney General admitted below, "is not the sort of thing of which a person may correctly be said to be a 'citizen' or 'national' ". Brief of Appellee, *Dai Ming Shih et al. v. Kennedy*, No. 16,426, United States Court of Appeals for the District of Columbia Circuit, pp. 8-9.

Nor is the construction adopted below required in order to facilitate the deportation of otherwise undeportable aliens. Cf. *Rogers v. Chieng Fu Shong*, op. cit.; S. Rep. No. 1515, 81st Cong., 2nd Sess., 637-638 (1950). Seven additional alternative places of deportation are available should the country of the alien's nationality not accept him. 8 U.S.C. 1253(a).

The legislative history of the statutory directive indicates that it was inspired by a purpose to avoid "complications in our foreign relations" (see testimony of Robert C. Alexander, Assistant Chief, Visa Division, State Department, Hearings, H.R. 10, 81st Cong., 1st Sess., Subcommittee No. 1, House Committee on the Judiciary, May 20, 25, 1949, pp. 12-13), and was intended as a limitation upon the wide-ranging discretion of the Attorney General to choose among various alternative countries for deportation. Cf. Section 23, Internal Security Act of 1950, op. cit., with Section 243, Immigration and Nationality Act of 1952, op. cit.

This problem is underscored here by the fact that the determination of the nationality of aliens is governed, of course, not by United States law, but by the domestic law of the country in which the nationality of the alien is asserted. *United States v. Wong Kim Ark*, op. cit., III *Hackworth, Digest of International Law*, 346; Rabel, *Conflict of Laws, A Comparative Study*, 146, 149; Tunis-Morocco Nationality Decrees, P.C.I.J. Publ. Series B, No. 4 (1923). The holding below, which in effect vests citizenship of an

alien in an entity in which he can have no nationality, being contrary to the rule of customary nationality law, may induce the very complications in foreign relations which the proponent of the provision here sought to avoid.

A recent change in the administrative practice requires that the country, or countries, to which an alien is to be deported shall be designated on the record "in the alternate". 8 C.F.R. 242.17, 26 F.R. 12110, 12112 (December 19, 1961). Every deportation order, as a result, now involves a determination by a special inquiry officer of the Immigration and Naturalization Service of the country of which an alien is a subject, national, or citizen.

The proper construction to be given to the statute is therefore a recurring problem in the enforcement of the deportation laws. Cf. *Delany* v. *Moraitis*, 136 F. 2d 129 (C.A. 4, 1943); *Chan Cheun* v. *Esperdy*, 285 F. 2d 353 (C.A. 2, 1960); *Chao-Ling Wang* v. *Pilliod*, 285 F. 2d 517 (C.A. 7, 1960); *Liang* v. *United States Department of Justice*, 290 F. 2d 614 (C.A. 9, 1961); *Leong Leun Do* v. *Esperdy*, 197 F. Supp. 534 (S.D. N.Y., 1961). It warrants an ultimate determination by this Court.

II

The Court below also held that deportation may be effected to the *de facto* territory of the country of which the alien is a national, and that the statutory phrase "its territory" may be applied to the relationship between Formosa and the Republic of China.

Apart from China, there have been territorial changes and *de facto* administration in areas affecting Austria, Bulgaria, Czechoslovakia, the Free City of Danzig, Estonia, Finland, Germany, Hungary, India, Jerusalem, Jordan, Latvia, Lithuania, Pakistan, Palestine, Poland, Rumania, and the Union of Soviet Socialist Republics. None of the changes in control of the territories in question has re-

sulted in a change of sovereignty recognized by the United States. See Visa Office Bulletin No. 39, Dept. State, and attached map, February 9, 1959.

The ruling below that an alien may be deported to *de facto* territory of the country of which he is a subject may have an impact among these numerous other areas, all of which are sensitive in the conduct of the foreign relations of the United States.

If a native of China may be deported to Formosa as the *de facto* territory governed by the Republic of China, he may also be deported to Tibet, the *de facto* territory of the *de facto* Peoples' Republic of China, (Cf. United States ex rel. *Moon* v. *Shaughnessy*, op. cit., 218 F. 2d at 319); a citizen of the *de jure* government of Poland may be deported to the territory of the Free City of Danzig, which that country controls *de facto*; a citizen of India may be deported to Kashmir or to Goa, over which the government of India administers *de facto* control.

The importance of this question has been recognized in *United States ex rel. Mrazitch* v. *Tod*, op. cit., but the issue has never been decided by this Court.

The solution which the Court below reached seems contrary to the expressed intent of Congress both as to the question whether the term "its territory" in Section 243(a) of the statute, should be given its sovereign meaning, and as to the specific issue whether Formosa should be deemed to be the territory of the Republic of China for purposes other than those expressly stated.

A. The relevant legislative materials indicate that Congress sought to circumscribe the attribution of a *de facto* meaning to the territory of the country to which aliens are to be deported.

In *Delany* v. *Moraitis*, op. cit., which involved a construction of Section 20 of the antecedent Immigration Act of 1917, 39 Stat. 874, 890, 8 U.S.C. 156, the Fourth Circuit

had defined country in "a situation which Congress did not foresee" (136 F. 2d 129, 132) broadly enough to permit the deportation of a Greek seaman to the "custody of the Greek government-in-exile in England" but physically to a Greek vessel at a time when the territory of Greece was occupied by German military forces, *ibid.* 130, 133.

Within weeks following this construction of the statute, Congress enacted the Act of July 13, 1943, 57 Stat. 553, 8 U.S.C. 156 (1946 ed.), overruling the effect of the *Moraitis* holding. In place of permitting deportation to the custody of a government-in-exile, Congress required deportation of an alien to the "country in which is located that government in exile, if that country will permit him to enter its territory". *Ibid.* This provision has been reenacted as Section 243(b) of the Immigration and Nationality Act of 1952, 66 Stat. 214, 8 U.S.C. 1253(b).

Sovereignty over the territory, not the mere presence of a 'guest' government in the area, was thus made the condition of deporting an alien to a foreign country. Significantly, the fact that Congress chose to impose this requirement during the height of World War II by the Act of July 13, 1943, *loc. cit.*, and to reaffirm it during the Korean War by Section 243(b) of the 1952 Act is weighty evidence that the statute's overall purpose to remove deportable aliens from the United States is not intended to outbalance the Congressional intent to conform with the norms of international law and to avoid the possibility of embarrassment in the conduct of foreign affairs.

In addition, Congress made specific provision in other sections of the 1952 Act for giving effect to *de facto* changes in the territories of foreign countries.

Sections 201 and 202 prescribe immigration quotas for specific quota areas. 66 Stat. 175-178, 8 U.S.C. 1151, 1152. At Section 202(e), certain Executive officers are empowered "to provide for * * * any * * * political change,

requiring a change in the list of quota areas or of the territorial limits thereof . . . ." 8 U.S.C. 1152(e).

Subsection (e), however, explicitly provides:

> "The provision of an immigration quota for an area shall not constitute recognition by the United States of the political transfer of territory from one country to another, or recognition of a government not recognized by the United States." 8 U.S.C. 1152(e).

The qualification which appears in 8 U.S.C. 1152(e) is limited to the distribution of quota areas. Had Congress chosen, the words added in this section could have as well been applied to Section 214. The familiar text of Justice Holmes in *United States v. Johnson*, 221 U.S. 488, 496 (1911), which states a guiding principle of statutory construction, are applicable here:

> "The presence of such a phrase in the one part and its absence in the other is an argument against reading it as supplied . . . ."

Petitioner's view was assumed, although not decided, by the Second Circuit in *United States ex rel. Tom Man Wah v. Holt*, 204 F.2d 22, 23 (1953). In *Holt*, which it declared that a "bona fide citizen"

> "cannot be so curbed in the exercise of his rights as a citizen of the United States because we do not approve of the country from which he comes."

In the *Holt* case, it is to govern the meaning to be attributed to the word, country, in the phrase, "country to which such alien is deported," and if so, the same principle must govern the meaning of the same word in the same sentence, the qualifying subjunctive which says "if such country is willing to accept him into its territory."

B. No doubt whatever can exist as to the expressed policy of the United States regarding the relationship of Formosa to the Republic of China. Both the Executive and the Senate have meticulously avoided a determination that Formosa is the territory either of "China" or of the Republic of China.

The Japanese Peace Treaty provided for Japan's renunciation of all right, title, and claim to Formosa. Treaties and Other International Acts Series 2490. This was explained prior to its adoption by John Foster Dulles, then Consultant to the Secretary of State:

> "As regards Formosa, the differences of opinion are such that it could not be definitively dealt with by a Japanese Peace Treaty to which the Allied Powers, as a whole, are parties. Therefore, the treaty merely takes Japan formally out of the Formosa picture, leaving the position otherwise unchanged." 25 Dept. State Bull. 461, 462 (1951).

The United States and the Republic of China subsequently entered into a Mutual Defense Treaty which provides expressly that for the limited purposes of two articles of that treaty, Formosa is to be regarded as the territory of the Republic of China. 31 Dept. State Bull. 899, (1954).

It provides at Article VI:

> "For the purpose of Article II and V, the terms 'territorial' and 'territories' shall mean in respect of the Republic of China, Taiwan and the Pescadores; and in respect of the United States of America the island territories in the West Pacific under its jurisdiction." *Ibid.*

These include various island groups, such as the Ryukyus, the Bonins

In explaining an apparent distinction in the treaty between the "legal position of the coastal islands [...] and Formosa and the Pescadores", Secretary of State Dulles declared on December 1, 1954:

> "The legal position is different [...] by virtue of the fact that technical sovereignty over Formosa and the Pescadores has never been settled. That is because the Japanese Treaty merely involves a renunciation by Japan of the right and title to these islands. But the future title is not determined by the Japanese Peace Treaty, nor is it determined by the peace treaty which was concluded by the Republic of China and Japan. Therefore, the juridical status of these islands, Formosa and the Pescadores, is different from the juridical status of the offshore islands which have always been Chinese territory." 31 Dept. State Bull. 908 (1954).

Immediately following the signing of the treaty on December 2, 1954, Secretary of State Dulles exchanged letters with the Foreign Minister of the Republic of China, George K. C. Yeh, in which the "understandings" of the two governments was declared to be, in part, as follows:

> "The Republic of China effectively controls both the territory described in Article VI [Taiwan and the Pescadores] [...] and other territories." Documents on American Foreign Relations, 1954, pp. 360-361.

The United States Senate, for its part, adopted a resolution when it ratified the Mutual Defense Treaty on February

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State [...] "ratification" [...] the administering authority under United Nations Trusteeship Agreement. Treaties and Other International Acts Series, 1965, 2365 (*Agreements Effected 1964*); Supp. 1965 (Hearings 1956; and *Hearings*, 1954); Supp. 56 (H. Hearings 1957) [...] on the question whether Kwantung, a United Nations Trust Territory [...]

9, 1955, which stated with reference to the status of Formosa and the Pescadores:

> "It is the understanding of the Senate that nothing in the treaty shall be construed as affecting or modifying the legal status or sovereignty of the territories to which it applies." Senate Executive Report No. 2, 84th Cong., 1st Sess., February 8, 1955.

These materials establish that the United States, through its highest organs for the conduct of foreign relations, the Executive and the Senate, exercised the greatest circumspection in determining the relationship of Formosa to the Republic of China. These authorities saw fit not only to define expressly the term "territories" as applying to Formosa but to limit the implications of such a definition by a resolution and by an exchange of correspondence between governments.

Yet the Court of Appeals below would permit a supervisory deportation officer of the Immigration and Naturalization Services to make an identical determination in construing an act of Congress, in negotiating with the Consulate General of the Republic of China for the acceptance of a Chinese alien in Formosa, and in removing the alien to Formosa.

Whether this construction of the statute is permissible in the light of its legislative history and other relevant statutory language, and in view of the carefully formulated determinations relating to Formosa manifestly presents a question of great importance both in the enforcement of the deportation laws and in the conduct of foreign affairs.

Conclusion

The issues raised by the decision below, never before resolved by this Court, are of such continuing importance that a writ of certiorari should be granted.

Respectfully submitted,

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February, 1962.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,426

DAI MING SHIH, ET AL., *Appellants*,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, *Appellee*

Appeal from the United States District Court for the District of Columbia

Decided November 30, 1961

Before: FAHY, WASHINGTON AND DANAHER, *Circuit Judges*.

PER CURIAM: This is a deportation case. The aliens admittedly are in this country illegally. They were served with warrants of deportation which did not name the country to which they were to be deported, but simply stated that they were to be deported "pursuant to law." They were later notified that they were to be deported to Formosa. In their suit in the District Court they alleged that they were each "subjects, nationals, or citizens of China," and sought injunctive and declaratory relief against their deportation to Formosa. The District Court dismissed the complaint and granted the defendant-appellee's motion for summary judgment.

The governing statutory provisions are those of Section 243(a) of the Immigration and Nationality Act, 66 STAT. 212 (1952), 8 U.S.C. § 1253(a) (1958), reading in pertinent part:

"§ 1253. Countries to which aliens shall be deported.

"(a) Acceptance by designated country; deportation upon nonacceptance by country.

"The deportation of an alien in the United States provided for in this Act or any other Act or treaty, shall be directed by the Attorney General to a coun-

try, promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. . . . If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. *Thereupon deportation of such alien shall be directed to any country of which such alien is a subject, national, or citizen if such country is willing to accept him into its territory.*" (Emphasis supplied.)

Appellants argue that Formosa is not the country of which they are "subjects, nationals, or citizens," within the meaning of the emphasized portion of the quoted provisions;[1] that Formosa is not the "territory" of the Republic of China within the meaning of those provisions; and that the phrase "its territory" means sovereign rather than de facto territory. We think that the complaint must be construed to mean—and appellants' counsel does not urge the contrary—that appellants are "subjects, nationals, or citizens," of the Republic of China. We have held that Formosa is a "country" to which subjects, nationals or citizens of the Republic of China may be deported. *Rogers* v. *Cheng Fu Sheng*, 108 U.S. App.D.C. 115, 280 F.2d 663, cert. denied, 364 U.S. 891 (1960). The statutory phrase "its territory," as applied to the relationship between the Republic of China and Formosa, does not for reasons akin to those given in the *Cheng Fu Sheng* case—lead to any contrary result. Cf. *United States ex rel. Leong Choy Moon* v. *Shaughnessy*, 218 F.2d 316 at 318, 320 (2d Cir. 1954); *Chao-Ling Wang* v. *Pilliod*, 285 F.2d 517 (7th Cir. 1960); *Liang* v. *U.S. Department of Justice, etc.*,

[1] The aliens did not designate the country to which deportation should be made, and accordingly both parties agree that the sentence in italics governs the present case.

290 F.2d 614 (9th Cir. 1961); *Wong Lum* v. *U. S. Esperdy*, 187 F.Supp. 95 (S.D. N.Y. 1960).

Appellants also urge that the warrants of deportation are void for failure to specify the country to which they are to be deported. This point must be rejected, for the reasons given in *Ying* v. *Kennedy*, —— U.S.App.D.C. ——, 292 F.2d 740, *cert. denied*, —— U.S. ——, 30 U.S.L. WEEK 3154 (1961).

The order of the District Court will accordingly be

Affirmed.

Filed November 30, 1961. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Civil 863-61

No. 16,426

September Term, 1961

DAI MING SHIH, ET AL., *Appellants*,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, *Appellee*

Appeal from the United States District Court for the District of Columbia

Before: FAHY, WASHINGTON AND DANAHER, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court, that the order of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam.

Dated: November 30, 1961.

[Filed June 9, 1961]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

. . . . . .

ORDER

This matter having come on for hearing on cross motions for summary judgment and the Court having considered the pleadings and oral argument and it appearing that there is no genuine issue as to material fact and that the defendant is entitled to judgment as a matter of law, it is by the Court this 9th day of June, 1961,

ORDERED that the defendant's motion for summary judgment be and the same hereby is granted; and it is

FURTHER ORDERED that the plaintiffs' motion for summary judgment be and the same hereby is denied; and it is

FURTHER ORDERED that the plaintiff's motion for a preliminary injunction be and the same hereby is denied as moot and that the temporary restraining order entered by this Court on March 29, 1961 be and the same hereby is dissolved; and it is

FURTHER ORDERED that the complaint be and the same hereby is dismissed with prejudice and with costs awarded to the defendant.

MATTHEW F. McGUIRE,
United States District Judge.

(1328-4)

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 752

DAI MING SHIH, WONG LUM, AND FU KUEI HUS, PETITIONERS

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 17–19; R. 17–19) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1961 (R. 20). The petition for a writ of certiorari was filed on February 27, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the provision of Section 243(a) of the Immigration and Nationality Act, 8 U.S.C. 1253(a), authorizing an alien to be deported to the country of which he is a "subject, national or citizen, if such country is willing to accept him into its territory", prevents a native of China from being deported to Formosa as the country of which he is a subject, national, or citizen.

STATUTE INVOLVED

Section 243 of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 212, 8 U.S.C. 1253, provides in pertinent part:

> (a) The deportation of an alien in the United States provided for in this Act, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the

Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be directed to any country of which such alien is a subject, national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—

(1) to the country from which such alien last entered the United States;

(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;

(3) to the country in which he was born;

(4) to the country in which the place of his birth is situated at the time he is ordered deported;

(5) to any country in which he resided prior to entering the country from which he entered the United States;

(6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or

(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory.

* * * * *

STATEMENT

Petitioners, Chinese crewmen, who had overstayed their leave, were ordered deported "pursuant to law" (R. 7, 9–10, 13–14). Later, the petitioners were notified that they would be deported to Formosa (R. 2, 4).

Petitioners then filed suit in the United States District Court for the District of Columbia for a declaratory judgment and injunctive relief, alleging that they were each "subjects, nationals, or citizens of China", and not of Formosa, and that the Attorney General could not deport them to "Formosa as the country of which they are subjects, nationals or citizens" (R. 2–3). The district court dismissed the complaint and granted the respondent's motion for summary judgment (R. 15–16). The court of appeals affirmed (Pet. App. 17–19).

ARGUMENT

The applicable statute is the second alternative for deportation under Section 243(a) of the Immigration and Nationality Act[1] (*supra*, p. 3), providing:

[1] The first alternative, under which the alien may be permitted to choose the country to which he is to be deported, did not apply. Petitioners Dai Ming Shih and Fu Kuei Hsu did not indicate any country of their preference (R. 9, 10). Petitioner Lum Wong asked to be deported to Hong Kong (R. 13), but there is nothing in the record to show that Hong Kong, within the 3-month period provided in Section 243(a), expressed willingness to accept him.

> Thereupon deportation of such alien shall be directed to any country of which such alien is a subject, national, or citizen if such country is willing to accept him into its territory. * * *

Under this provision, petitioners, as "subjects, nationals, or citizens" of China (the Republic of China), are being deported to the "country" (the Republic of China) of which they are "subjects, nationals, or citizens". That "country" (the Republic of China) is "willing to accept" them "into its territory", *i.e.*, Formosa, which for the purposes of this statute is to be considered territory of the Republic of China. Therefore the deportation of the petitioners to Formosa is wholly lawful.

1. Petitioners alleged in their complaint (R. 2) that they are "subjects, nationals, or citizens" of China. The government of China which the United States recognizes is the Republic of China. That country, the Republic of China, being a state in the international sense and a foreign government which the United States recognizes as the legal government of China,[2] is a "country" under Section 243(a) of the Act. *Ying* v. *Kennedy*, 292 F. 2d 740, 743 (C.A.D.C.), certiorari denied, 368 U.S. 914. Cf. *Burnet* v. *Chicago Portrait Company*, 285 U.S. 1, 5, 7. It is "willing to accept" the petitioners "into its territory" (Formosa) as the lawful destination of their deportation.[3]

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[2] 31 Dept. State Bull. 889 (1954); *Rogers* v. *Cheng Fu Sheng*, 280 F. 2d 663, 664, n. 2 (C.A.D.C.), certiorari denied, 364 U.S. 891.

[3] The record affirmatively shows the consent of the Republic of China to the issuance of passports for the deportation of petitioners Dai Ming Shih and Hsu Fu Kuei to Taiwan

2. Formosa is properly considered as territory of the Republic of China for the purposes of deportation under the part of Section 243(a) here involved. It is true that neither Article 2 of the Japanese Peace Treaty of April 28, 1952, under which Japan renounced all "right, title and claim" to Formosa, nor any other agreement has purported to transfer the sovereignty of Formosa to China. 39 Dept. State Bull. 1005, 1006 (1958). Formosa is however a territory occupied and administered by the government of the Republic of China which has "undisputed control of the island". *Rogers* v. *Cheng Fu Sheng*, 280 F. 2d 663, 664–665 (C.A.D.C.), certiorari denied, 364 U.S. 891. The Mutual Defense Treaty between the United States and the Republic of China, signed on December 2, 1954, in Article VI treats Formosa as a territory of the Republic of China: "For the purposes of Article II and V, the terms 'territorial' and 'territories' shall mean in respect of the Republic of China, Taiwan (Formosa) and the Pescadores; * * *". 31 Dept. State Bull. 899 (1954). This recognized *de facto* control over the island of Formosa by the government of the Republic of China is sufficient to make that island "its territory" within the meaning of Section 243(a). Recognition of this is implicit in the decided cases holding that Formosa is a "country". See *Rogers* v. *Cheng Fu Sheng*, *supra*; *United States*

(Formosa) (R. 5, 12). Although there is no such corresponding record reference as to petitioner Lum Wong, his situation is presumably the same as that of the other two petitioners since in the complaint it is alleged that the Attorney General notified each of the petitioners that he intended to deport them to Formosa (R. 2).

ex rel. Leong Choy Moon v. *Shaughnessy*, 218 F. 2d 316 (C.A. 2); *Chao-Ling Wang* v. *Pilliod*, 285 F. 2d 517 (C.A. 7); *Liang* v. *U.S. Department of Justice*, 290 F. 2d 614 (C.A. 9); *Wong Lum* v. *Esperdy*, 187 F. Supp. 95 (S.D.N.Y.). After the Germans had overrun Greece during World War II, leaving it without any territory, it was held that an alien could be deported to the Greek government in exile in England by returning him to a vessel flying the Greek flag (*Delany* v. *Moraitis*, 136 F. 2d 129 (C.A. 4)). The instant case is even stronger since the Republic of China does actually have territory in Formosa upon which it is prepared to receive the returning aliens.

No embarrassment in the conduct of our foreign affairs would result from regarding Formosa as territory of the Republic of China for the purposes of deportation under Section 243(a). This reading does not affect the determination of the status of Formosa and the question as to its sovereignty in other fields. It would be anomalous for the United States to recognize the Republic of China as a lawful government, and at the same time deny it the right to receive its deported citizens into the territory in which that government functions.

Petitioners do not claim any right to remain in this country. They are not being deported to a country with which they have no natural ties. Their deportation has been fairly decreed and is proper under the second alternative for deportation provided in Section 243(a).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1962.

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